In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 461

LIFETIME SIDING, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question whether petitioner is entitled to a refund of Social Security tax turns on whether certain individuals were its "employees" within the meaning of §§ 3121(d)(2) (Federal Insurance Contributions Act) and 3306(i) (Federal Unemployment Tax Act) of the Internal Revenue Code of 1954. These sections prescribe that "the usual common law rules applicable in determining the employer-employee relationship" shall be applied in cases such as

this. Cf. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 3; *United States* v. *Silk*, 331 U.S. 704, 716.

Petitioner's business, during the relevant period, consisted of selling and applying new roofing and siding for houses in need of repair. The work of affixing the materials to the houses was done for petitioner by individuals called "applicators," whose employment status is here involved. After a four-day trial, the jury was instructed on the law, petitioner having taken no exception to the charge. By special verdict, the jury found that the applicators were employees, and not independent contractors.

Petitioner summarized the questions it seeks to raise as follows (Pet. 9):

> [1] that there was no issue to be submitted to a jury, [2] that the issue involved could not properly be submitted to a jury of laymen because it involves the meaning of specialized taxing statutes which were not referred to in the special questions submitted to the jury, and [3] because of a basic error of law which permitted the introduction of irrelevant and prejudicial evidence by the government in the form of a proof of subjective intent of the "parties" and of the workers whose legal status was in issue * * *.

The petition is based upon a gross misconception of the roles of judge and jury in our judicial system. The court of appeals examined the evidence introduced by both sides at the trial and concluded that "the evidence presented a close question of fact which, under the controlling statutes, could be resolved only by the trier of facts—here, the jury" (Pet. A 21). Evi-

dence as to the subjective intent of the parties was properly introduced by the government; and the jury was correctly charged as to the manner in which this and the other evidence of record, should be evaluated in applying the appropriate legal principles. The question whether the applicators were employees "contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law." *Baker* v. *Texas & P.R. Co.*, 359 U.S. 227, 228.

The decisions below are correct, there is no conflict, and no question is presented requiring consideration by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1966.

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